No. 14-556, -562, -571, -574

IN THE
Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,
Petitioners,

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF OHIO DEPARTMENT OF HEALTH, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch seeks to participate as *amicus curiae* for the purpose of highlighting the proper role of the States and the democratic process in the area of marital relations. Of particular concern to Judicial Watch is the inevitable constitutional conflicts that will result should the Court permit the federal courts to commandeer the role of the States and the democratic process. Judicial Watch addresses the second issue before the Court regarding the recognition of out-of-state marriages that conflict with state law.

SUMMARY OF THE ARGUMENT

The role of defining marriage and implementing laws in regard to it has always been primarily the province of the States. This Court has clearly and firmly confirmed this. Interference with the States'

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amicus Curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting the parties' consent have been filed with the Clerk.

sovereign sphere and ultimately, with the right of their citizens to engage in the democratic process, is contrary to our system of government and will result in dangerous constitutional conflicts.

ARGUMENT

I. DENYING RECOGNITION OF OUT-OF-STATE MARRIAGES THAT CONFLICT WITH STATE LAW IS NOT A CONSTITUTIONAL VIOLATION.

The consolidated Petitioners claim that the laws of the States of Ohio, Kentucky and Tennessee which do not recognize out-of-state marriages that conflict with state law, violate the Equal Protection and Due Process clauses of the Fourteenth Amendment. None of the Petitioners address the Full Faith and Credit Clause.

A. DEFINING MARRIAGE IS WITHIN THE STATES' SOVEREIGN SPHERE OF MARITAL RELATIONS.

"The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). This clear holding has been reaffirmed by this Court time and again. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property

interests, and the enforcement of marital responsibilities.'"); *see also U.S. v. Windsor*, 133 S. Ct. 2673, 2689 (2013) ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.")

While it is in within the federal government's power to intervene in the sphere of marital relations, this Court has made it very clear that those interventions are to be infrequent, deferential to State authority, and always with the balance of federalism in mind. *See e.g., Windsor*, 133 S. Ct. at 2690; *see also De Sylva v. Ballentine*, 351 U.S. 570, 590 (1956).

This general point cannot be overstated here. It was the primary reason the Court held that the federal Defense of Marriage Act ("DOMA") was unconstitutional in *Windsor*. The Court held that Congress had overstepped its authority and infringed on the State of New York's sovereign authority to define marriage and "allow the formation of consensus respecting the way members of a discrete community treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S. Ct. at 2692. New York's actions were "without a doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.*

The cases before the Court now are simply the flip side of *Windsor*'s coin. If it was within the sovereign authority of the State of New York and its citizens to redefine marriage, it is also within the

sovereign authority of the States of Ohio, Kentucky, Tennessee and Michigan and their citizens to maintain their current and democratically defined definition of marriage.

B. UPHOLDING THE TRADITIONAL DEFINITION OF MARRIAGE DOES NOT VIOLATE THE RATIONAL BASIS TEST.

This Court has never held there is a fundamental right to same sex marriage. In *Loving v. Virginia*, a case often cited by Petitioners in support of their cause to find such a fundamental right, the Court held that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). This Court further stated that to "deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in the statues, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving*, 388 U.S. at 12. It is essential to understand that *Loving* did not redefine marriage but simply invalidated an unconstitutional eligibility requirement which was already designated as a suspect classification and subjected by this Court to the most rigid scrutiny. *See Korematsu v. U.S.*, 323 U.S. 214, 216 (1944). Attempts to shoehorn these cases into *Loving* would make this Court's summary rejection of same sex marriage as a "substantial federal question" in *Baker v. Nelson* –

five years after *Loving* – absurd.[2] *Baker v. Nelson*, 409 U.S. 810 (1972).

Additionally, sexual orientation has never been recognized as legally protected "suspect class." *See Romer v. Evans*, 517 U.S. 620 (1996), *see also Korematsu v. U.S.*, 323 U.S. 214, 216 (1944). For these reasons the laws and amendments prohibiting recognition of out-of-state same sex marriages must meet the "rational basis" test. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *see also Heller v. Doe*, 509 U.S. 312, 330 (1993).

This Court has been very clear about the burden imposed on legislative actions. "[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer* at 632. "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The Respondent States each have defined marriage as a relationship of one man and one woman. Ohio's definition was first set in 1803, Kentucky's in 1973, and Tennessee's in 1741. *See* An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); An Act

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[2] Interestingly, none of the district courts even address *Baker v. Nelson*.

Concerning Marriages § 3 (1741), *in Public Acts of the General Assembly of North-Carolina and Tennessee* 46 (1815). Each state legislature reaffirmed their traditional definition and later passed by voter approval, constitutional amendments. *See* Ky. Const. § 233A; Ohio Const. art. XV, § 11; Tenn. Const. art. XI, § 18.

The Respondent States and their citizens have given several bases for maintaining the traditional definition of marriage which include child-rearing, tradition and respect for our constitutional concept of federalism. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 980-81 (2013); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050-51, 1056 (S.D. Ohio 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 768, 771 (M.D. Tenn. 2014). While the district courts dismissed each of these grounds, they did so while applying the incorrect level of legal scrutiny. The U.S. Court of Appeals for the Sixth Circuit found at least two sufficient bases to retain the traditional definition of marriage under the rational basis test.

First, the Court of Appeals recognized the States' interest in maintaining the traditional definition of marriage as it furthers the government interest in child-rearing. *DeBoer v. Snyder*, 772 F.3d 388, 404-05 (6th Cir. 2014). "It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative." *Id.* at 405. That children can be reared outside of the marriage relationship does not change the biological

fact that a child can never be the biological result of a same sex relationship. As the Court of Appeals explained:

> By creating a status (marriage) and by subsidizing it (*e.g.*, with tax filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring. That does not convict the States of irrationality, only an awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and couples of the same sex do not run the risk of unintended offspring.

DeBoer, 772 F.3d at 405.

In fact, this Court acknowledged as much in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), in stating "marriage and procreation are fundamental to the very existence and survival of the race." Without opposite sex relationships – of which the state domestic relations laws encourage permanence through marriage – the very "existence and survival of the race" is at issue. Surely that is not an irrational basis on the part of the Respondent States.

Second, the Court of Appeals found the States' interest in maintaining the traditional definition of marriage furthered by the government interest in tradition itself. *DeBoer*, 772 F.3d at 406-07. This Court has recognized the important role of tradition. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court

held that the right of parents to make be primary decision-makers for their own children was a "right recognized because it reflects a 'strong tradition' founded on the 'history and culture of Western civilization.'" *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977) (quoting *Yoder*, 406 U.S. at 232); *see e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818-1820 (2014). While tradition cannot run afoul of constitutional rights and privileges, absent a fundamental right or suspect classification, it can most certainly form a sufficient rational basis. *See e.g., Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

It cannot be seriously contested and in fact, none of the Petitioners have claimed as much, that marriage, defined as one man and one woman, has been the tradition in this country since its founding and continued, unabated, until only the past ten to fifteen years. And even in the most recent years after some States like Connecticut and New York passed legislative measures to change the traditional definition of marriage, most of the States where the traditional definition of marriage has been changed has been done through judicial actions and not the will of the people. And in fact, several States including California and Virginia where the voters clearly desired to maintain the traditional definition of marriage, state administrators and federal courts denied their collective voices. It is not a stretch therefore to conclude that the majority of people in this country still consider marriage to be defined as one man and one woman – just as the definition has been from the founding of the nation.

The Court has dealt with the implication of historical and traditional use in Establishment Clause cases which are instructive here. In *Marsh v. Chambers*, the Court held that Nebraska's practice of opening legislative sessions with prayer was not a violation of the Establishment Clause. In so finding, the Court weighed heavily the longstanding tradition both in Nebraska and the United States of the presence of prayer in legislative sessions as well as the presence of other religious factors. 463 U.S. at 790-91. The Court stated that "unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from prayer similar to that now challenged." *Id.* And even more clearly the Court held that "in applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.*

Marriage has, by definition, been the province of the States and has been traditionally defined as one man and one woman. This has been the case since the nation's founding. There is no evidence that defining marriage in that way was viewed as discriminatory or in violation of any constitutional rights or principles. Segments of society have begun to take a different perspective but this is hardly a sufficient reason to cast aside this "unique history" consistent with "centuries of national practice." 463 U.S. at 790. "[I]t is not necessary to define the precise boundary of the Establishment Clause where

history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece* at 1819. "From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning the Fourteenth Amendment permits, though it does not require, States to define in that way." *DeBoer*, 772 F.3d 388, 404; *see also Town of Greece*, 134 S. Ct. at 1818-1820.

C. REQUIRING RECOGNITION OF OUT-OF-STATE MARRIAGES THAT CONFLICT WITH STATE LAW LEADS TO CONSTITUTIONAL CONFLICTS.

While denying recognition of out-of-state marriages that conflict with state law does not amount to a constitutional violation, forcing the Respondent States to recognize such marriages will in fact lead to constitutional conflicts. Three such conflicts are readily apparent.

First, forcing States to recognize out-of-state same sex marriages that conflict with state law would ostensibly open the door to forcing States to recognize all out-of-state marriages that conflict with state law regardless of the conflict. This would completely remove the States from the marital relations sphere or at the very least, make state laws worthless.

Part of the States' authority in the sphere of martial relations has been the ability to define marriage in general and determine who is eligible to marry. As with defining the gender of the participants, States have also defined the number of persons who can be involved in the marital relationship.[3] Common factors involved in the eligibility determination have been age, familial consanguinity, whether the couple needs to be physically present (proxy) and who may solemnize the marriage. Even among the four Respondent States some of these factors vary in age requirements and whether cousins may marry. No one seems inclined to level an age discrimination claim against the State of Kentucky for requiring marriage participants to be eighteen years of age while neighboring states have lower age requirements. *See* Restatement (Second) of Conflict of Laws § 283.

It is important to point out the legal effect some of these factors have on recognition of an out-of-state marriage. While states have recognized out-of-state marriages that do not meet their own state marriage requirements, it is not unusual for States to refuse to recognize out-of-state marriages that conflict with state laws. For instance, Ohio has recognized out-of-state marriages between first cousins even though Ohio residents could not marry if they were first cousins. *See Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958). Ohio, however, refused to recognize an out-of-state marriage between an uncle and his

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[3] It should also be noted that the Congress first passed a federal anti-bigamy law in 1862. This Court upheld the law in *Reynolds v. United States*, 98 U.S. 145 (1878).

niece. *See In re Estate of Stiles*, 59 Ohio St. 2d 73, 75 (75-76) (1979). The difference between the two cases was whether the marriage was voidable (first cousins) or void in fact (uncle and niece). Because Ohio clearly legislated against the latter relationship, the court held Ohio was not required to recognize the out-of-state marriage. Respondent States have clearly legislated who may marry in their jurisdictions.

Also clearly legislated by the Respondent States are the number of persons who may marry at one time. If Petitioners' reasoning is followed through to its logical and legal conclusion, what legal foundation do the Respondent States, or the United States for that matter, have for denying more than two willing participants to enter into a marriage relationship? If changing culture can be the basis for undoing centuries of legal and moral tradition as to gender, why can it not also be the basis for undoing centuries of legal and moral tradition in terms of the number of people married? Or even siblings? "If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage." *DeBoer*, 772 F.3d at 407.[4]

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[4] Despite the absence of the Full Faith and Credit Clause in the Petitioners' briefs, the Court cannot simply ignore its existence. The Court held that the Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422-23 (1979).

This decision is not being made in a vacuum and must be considered in light of all of the state laws regarding marital relations. Judicially breaking down the door of state sovereignty will lead to no door at all.

Second, it is of the utmost importance to recall that the laws being questioned by Petitioners were also voted on by the citizens of Respondent States. These were not only legislative actions but the actions of millions of everyday voters. The right to vote is clearly defined in the Bill of Rights to the U.S. Constitution. Citizens' right to vote "shall not be denied *or abridged by the United States* by any state on account of race, color, or previous condition of servitude," or sex, or age. U.S. CONST. amend. XV, XIX, XXVI (emphasis added). A citizen's right is abridged when he or she is deprived of that right or the right is limited or restricted. By overstepping the bounds of state sovereignty and declaring by judicial fiat that the millions of voters who democratically adopted the marriage amendments were wrong, the district courts effectively abridged the right to vote of each and every one of those citizens. The message sent to these citizens is that, despite engaging in the democratic process and debate regarding issues predominately within the state sphere and casting their constitutionally protected votes, when a federal court decides it knows better, their votes will mean nothing. The inevitable consequence of this type of federal interference will be voter disenfranchisement. How can we beat the patriotic drum of voter involvement when the ultimate end can be erased by a few federal judges?

Third, the health and sustainability of our system of government depends greatly on our principle of federalism. This Court has described our system as a "fundamental principle" and referred to the Federal Government and State governments as both possessing sovereignty:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. 700 (1869) and *Lane County v. Oregon*, 74 U.S. 71 (1869)).

Without this delicate balance our constitutional rights and principles cannot survive. "[T]he distinction, for there is a distinction, between the federal powers vested in Congress, and the sovereign authority belonging to the several States, which is the Palladium [the protection] of the private, and per-

sonal rights of the citizens." Letter from Samuel Adams to Richard Henry Lee, August 24, 1789 (available at http://consource.org/document/samuel-adams-to-richard-henry-lee-1789-8-24/). What the Petitioners ask this Court to do is to weaken that balance by removing the issue of defining marriage from the States and her citizen voters and giving it to the federal judiciary. "A principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in judge's values." *DeBoer*, 772 at 416.

To be sure, marriage is primarily the province of the States. It has been from the nation's founding and the Court should not remove it from the States' sovereign sphere. We must always recall that:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. ... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (James Madison).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court uphold the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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